the body of the instrument have become parties to it, will not be binding, unless this condition is complied with. Rawling *vs.* The United States, 4 Cranch Rep. 219. Or if it be agreed that a composition deed shall not be binding upon the surety until all the creditors execute it, the instrument does not take effect until that is effected. Johnson *vs.* Baker, 4 Barn. & Ald. 440. The deeds in both the foregoing cases were regarded as escrows until the condition precedent was complied with, and as such held by the principal after execution by the surety. See also Pidcock *vs.* Bishop, 3 Barn. & Cr. 605, where it is held that any fraud practised upon the surety will invalidate the obligation. S. P. Fletcher *vs.* Austin, 11 Verm. R. 447.

3. The same principle extends to promissory notes and other contracts not negotiable, or to negotiable contracts before negotiation. Awde *vs.* Dixon, 5 Eng. L. & Eq. R. 512; Lloyd *vs.* Howard, 1 Id. 227; Palmer *vs.* Richards, Id. 529; Leaf *vs.* Gibbs, 4 C. & P. 466.

4. But in regard to negotiable instruments which are executed for the sake of raising money in the market, and especially after they have been once negotiated, the rule is held otherwise, and the surety, or any other party, having executed the paper, and intrusted it to others, is regarded as having given them power to negotiate it. Passumpsic Bank *vs.* Goff, 31 Verm. R. 315. The surety must run the risk of the fraud of his own agent, unless there is something upon the paper to show that other parties, were expected to sign with him.

Even a blank acceptance, which is *taken while blank*, only binds the party to the extent of his agreement; but if filled up and negotiated, it binds to the extent of the contract. Hatch *vs.* Searles, 2 Smale & Giff. 147; 1 Am. L. C. 321, 322. Russell *vs.* Longstaffe, Doug. 14, is thus essentially qualified.

We cannot perceive why the principal case does not rest fairly upon the principle involved in the foregoing cases.

I. F. R.

Supreme Court of Connecticut.

MOSES L. NOYES AND ANOTHER *vs.* THE NEW HAVEN, NEW LONDON AND STONINGTON RAILROAD COMPANY.

A partner has power to compromise and discharge a claim of the partnership against a third party.

And a payment to a partner is a good payment to the firm, although the other partner or partners had given notice to the debtor not to pay to such partner. The debtor has a right to pay his debt, and cannot be affected by the disagreement of the partners as to who shall receive the money. Any partner wishing to prevent such payment must seek the aid of a court of chancery.

Whether the power of a partner to bind the partnership by an *executory* contract, would not be affected by a notice from the other partners revoking his authority: *Quere.*

N., one of two partners to whom a large sum was due from a railroad company on

an unsettled account, gave notice to the company not to make a settlement unless both partners were present. E., the other partner, was seeking to obtain the money due for the purpose of applying it to his own private use, and of defrauding N.; and the railroad company, knowing of this intention and for the purpose of aiding him in accomplishing it, as well as for the purpose of getting a more favorable settlement of the account, made a secret settlement with E., and paid him a sum agreed to by him as the balance due, and took a discharge of the partnership debt. N. had no knowledge of the settlement till E. had left the state with the money, when he gave immediate notice to the company that he should not recognise the settlement. In an action of assumpsit brought in the name of the partnership against the railroad company, to recover the amount of the account, it was *held*, that whatever remedy N. might have in any other form, yet that no action could be sustained in the name of the partnership to recover again the money so paid.

Assumpsit, brought by the plaintiffs, partners under the name of Noyes & Eddy, to recover an amount claimed to be due them under a contract for the construction of a portion of the road of the defendants. The defendants were defaulted, and the case heard in damages before PARK, J.

On the hearing, it was found by the Court, that the defendants on the 31st day of December, 1857, were indebted to the plaintiffs on the contract in the sum of $18,808.38, and that of that amount, the sum of $17,595.93 was on that day paid by the defendants to and received by the partner Eddy, on behalf of the plaintiffs, in full of the indebtedness.

The plaintiffs offered testimony to prove that Noyes had notified the defendants not to pay the balance due them to Eddy, and that the payment was made in disregard of the prohibition, and claimed that it was therefore not available to the defendants in their defence, but the Court held that Eddy had a right as partner to receive payment of the money due the plaintiffs notwithstanding the dissent of Noyes.

The plaintiffs further insisted that the defendants were guilty of fraud upon Noyes, in the means taken to accomplish a settlement with Eddy, and upon the evidence introduced by them in support of this claim the Court found as follows:—

The plaintiffs commenced work under their contract in July 1857, and continued until December following. During all that

time, all the transactions between the company and the copartnership were carried on through Noyes. On two occasions the president of the company passed by Eddy, when at hand, and procuring a horse and carriage rode to Stonington, some twelve miles distant, for the purpose of paying the monthly estimates to Noyes. In November, it was arranged, that the contract should be given up, and the defendants agreed to pay for all the work performed according to the terms of the contract. The work substantially ceased on the 2d day of December, 1857, when the chief engineer commenced making up the final estimates of work done. Noyes at this time was waiting at Stonington for the final estimate to be completed. It was completed on the 30th of December, and for some time before Noyes had made daily inquiries when it would be finished. He was told repeatedly, that the final estimate would be given to him, and the chief engineer so informed him but a few days before its completion. Eddy during this time paid no attention whatever to the final estimate. When the arrangement was made to give up the contract, Noyes notified the president of the company that all parties in interest must be present when the settlement should take place; and afterwards, at Stonington, he requested the president not to make a settlement or pay any money on account of the partnership unless all parties were present, and the president assented to this. Sometime previous to the settlement, the president entered into a secret negotiation with Eddy to settle with him alone, and it ended in an agreement to do so. The chief engineer was informed by the company of the fact, and instructed to keep the matter secret from Noyes. The engineer obeyed, and Noyes was deceived in relation to the time when the final estimate would be completed, and knew nothing whatever of the contemplated settlement with Eddy until after it had taken place and Eddy had left the State. The final estimate was completed about twelve o'clock at night, on the 30th of December, and the chief engineer remained in his office at Stonington, where he resided, until it was finished. At that time, it was arranged by the company to meet Eddy at New London the next day for the purpose of a settlement, and Eddy was telegraphed to at New York by the company to be there for

the purpose. The parties met in New London, and the company paid Eddy the sum of $17,595.93 on account of the partnership, and received from him a full discharge of all the partnership claims. When the arrangement was made to give up the contract, the firm had certain property along the line of the road, which they negotiated a sale of to the company for the sum of $2500. In the settlement Eddy agreed to take $1700 for the property, on the representation of the chief engineer that it was not worth more than that sum. The final estimate presented at the settlement, consisted merely in the gross amount of the work done and the sums of money that had been paid. Eddy knew but little concerning the matter, and it did not appear that he took any measures to inform himself, or had anything to say in the settlement in relation thereto. When the parties met at New London, the company being apprehensive that Noyes should ascertain what was being done, and come to New London before the settlement should be completed, directed two men to watch for him. After the settlement it was proposed to spend the night at New London, but fear was expressed lest Noyes might come, and so it was thought best for Eddy to leave that night for New York, which he accordingly did. A part of the amount paid by the company was in checks upon one of the banks in New Haven, payable within a few days, which checks Eddy, before leaving, procured to be discounted in New London after the banks had been closed for the day. Of the amount received by Eddy, about $100 came indirectly into the hand of Noyes through a third person, and the balance Eddy, after paying $7477.20 to the creditors of the firm, appropriated to his own use. As soon as Noyes heard of the settlement, he notified the company that he should not hold himself bound by it, charged them with fraud, and declared that he should call them to a legal account. The $100 he received merely to apply on the account with the company, and did not ratify the settlement made by Eddy. The greater part of the $7477.20 paid by Eddy had been attached in the hands of the company, and the company required in the settlement that these debts should be paid, and the remainder of the sum was not paid by Eddy until after he was compelled to do so by sundry other creditors.

On these facts, the Court found that Eddy in the settlement intended to defraud Noyes; that he intended to get all the money due the firm from the company into his own hands, to apply the same to his own individual use, and never intended to account for the same with Noyes; and that the transaction was carried on from the first with such purpose. The court also found that the company knew what was the purpose of Eddy from the commencement of the transaction to its close, and entered into the arrangement, and carried on their part of the transaction, partly under the expectation of a more favorable settlement with Eddy than with Noyes, and partly to assist Eddy in getting possession of all the money due the firm, that he might apply the same to his own individual use; and consequently, that the company was guilty of fraud on the plaintiff Noyes.

The Court decided that the settlement with Eddy was void as to Noyes, but good as to Eddy, and that the defendants were only entitled to the credit of such sums as appeared to have been actually applied by Eddy to the payment of creditors of the firm; and thereupon, without finding what was the actual state of the accounts between Eddy and Noyes, rendered judgment for the plaintiffs, for the balance left after deducting the $7477.20 applied by Eddy to the payment of creditors of the firm, and the $100 received by Noyes. The defendants thereupon moved for a new trial.

Baldwin and *Halsey*, with whom were *Lippitt*, *Park*, and *Pratt*, in support of the motion.—1. Each partner possesses the power to collect debts, receive payment, and give a discharge. *Ruddock's Case*, 6 Coke 25; *Stead* vs. *Salt*, 3 Bing. 101; *Pierson* vs. *Hooker*, 3 Johns. 68; *Bruen* vs. *Marquand*, 17 Id. 58; *McBride* vs. *Hagan*, 1 Wend. 326; *Wells* vs. *Evans*, 20 Id. 251; *Salmon* vs. *Davis*, 4 Binney 375; *Smith* vs. *Stone*, 4 Gill & Johns. 310; Coll. on Part., § 468; Story on Part., § 115. And this even if insolvent. *Mayor* vs. *Hawks*, 12 Ill. 298.

2. As Eddy had full authority as partner to receive payment of money due the firm, judgment should have been rendered for the plaintiffs for the unpaid balance only; because, 1st. In suits by

partners, all must join as plaintiffs. Story on Part., §§ 234, 235, 236. 2d. Whatever is a good bar or defence as to one partner, is equally so as to all. Story on Part., Id.; *Austin* vs. *Hall*, 13 Johns. 286. 3d. The equity of a defrauded partner cannot therefore be worked out in a Court of law. Story on Part., §§ 236, 238; Coll. on Part., §§ 643, 455, note to § 493; *Homer* vs. *Wood*, 11 Cush. 62; *Jones* vs. *Yates*, 9 B. & C. 532; *Richmond* vs. *Heapy*, 1 Stark. 202; *Wallace* vs. *Kelsall*, 7 Mees. & Wels. 264; *Greeley* vs. *Wyeth*, 10 N. Hamp. 15; *Gordon* vs. *Ellis*, 7 M. & G. 607. The Court held that the payment was binding upon Eddy, but not upon Noyes, and yet rendered judgment for Noyes and Eddy jointly to recover, as if no payment had been made. 4th. The remedy of a defrauded partner is by an action on the case or petition in Chancery. *Homer* vs. *Wood*, 11 Cush. 62; *Longman* vs. *Pole*, 1 Mood. & Malk. 223; Coll. on Part., § 455.

C. Chapman and *E. Perkins* (with whom were *Palmer* and *Trumbull*), contrà.—1. The only ground on which it can be claimed that a new trial should be granted, is that the payment of the $17,595 was a good and valid payment to the copartnership. If, however, it was not a payment for the benefit of the copartnership, but a payment to Eddy for his individual use, and for the purpose of enabling him to defraud the partnership, which is a fact most explicitly found, then it was not, either in fact or in law, a payment to the partnership, and does not operate to extinguish so far the debt due to the partnership.

It is said, however, that the authorities are decisive against an action at law in such a case in the name of the firm, and that the only remedy of Noyes is by a bill in equity against Eddy and the defendants. And the case of *Jones* vs. *Yates*, 9 B. & C. 532, is relied upon as a leading case upon this point. But that case is clearly distinguishable from the present, in the fact that the misconduct of the partner was itself the ground of the action, not, as here, the ground of defence.

The Supreme Court of Pennsylvania, in *Purdy* vs. *Powers*, 6 Penn. S. R. 492, say, "The fraudulent act of one partner does

not affect the title of the partnership." The case of *Homer* vs. *Wood*, 11 Cush. 62, cited on the other side, turned upon the point that the defendant was not implicated in the fraud of the partner. In the case of *Pierson* vs. *Hooker*, 3 Johns. 68, there was no fraud in any of the parties. So in those of *Stead* vs. *Salt*, 3 Bing. 101, *Bruen* vs. *Marquand*, 17 Johns. 58, *McBride* vs. *Hagan*, 1 Wend. 326, and *Salmon* vs. *Davis*, 4 Binn. 375. In the cases of *Wallace* vs. *Kelsall*, 7 Mees. & Wels. 264, and *Richmond* vs. *Heapy*, 1 Stark. 202, there was not only no question of fraud, but that circumstance is specially alluded to as an important one in each case. In *Longman* vs. *Pole*, 1 Mood. & Malk. 223, it was held that if a person colludes with one partner to defraud the others, a joint action at law can be maintained by the other partners against the person so colluding. In *Greeley* vs. *Wyeth*, 10 N. Hamp. 18, PARKER, C. J., seems to recognise the effect of a fraud as we claim it. So in *Gordon* vs. *Ellis*, 7 M. & G. 607, TINDALL, C. J, says, on page 621, "There is no allegation in the plea of any collusion between Gordon and the defendants." It will be found that, in all the cases cited on the other side, the element of fraud, so prominent in this case, was wanting, and that in many of them this absence of fraud was the turning point of the case. It is a maxim of universal acceptation in the law, that no man shall take advantage of his own wrong; and the defendants can be allowed to avail themselves of this defence only in violation of this important rule.

The authorities in support of our general position are numerous. *Leavitt* vs. *Peck*, 3 Conn. 124; *Tanner* vs. *Hall*, 1 Penn. S. R. 417; *Dobb* vs. *Halsey*, 16 Johns. 34; *Gram* vs. *Cadwell*, 5 Cowen 489; *Everinghim* vs. *Ensworth*, 7 Wend. 326; *Mercien* vs. *Andrus*, 10 Id. 461; *Burwell* vs. *Springfield*, 15 Ala. 273; *Noble* vs. *McClintock*, 2 W. & S. 152; *Minor* vs. *Gaw*, 11 Smedes & Marsh. 322; *Skiafe* v. *Jackson*, 3 Barn. & Cress. 421; *Farrar* vs. *Hutchinson*, 9 Adol. & El. 641; *Atlantic Bank* vs. *Merchants' Bank*, 9 Am. Law Reg. 241; 1 Am. Lead. Cases 452; 1 Parsons on Cont. 154.

That a bill in equity is not the proper remedy, is manifest from

the fact that a payment of the debt will be as good a defence in equity as at law.

ELLSWORTH, J.—We are all satisfied that the defendants are entitled to a new trial.

We can entertain no doubt with regard to the legal character and effect of the payment of the $17,595.93 by the defendants to Eddy, one of the partners, and one of the plaintiffs in this action. It must, in our judgment, put an end to the right of the plaintiffs to recover that sum again in this suit.

The superior Court found, that this sum was paid to Eddy and received by him in *satisfaction of the debt now in suit*, though something less than the amount actually due; and the Judge properly held that Eddy had a right to receive it for that purpose, and that the settlement was good and obligatory upon him, though upon what ground he could regard it as null and void as to Noyes it is not easy to perceive.

On these premises it would seem to be impossible that Eddy and Noyes can unite in suing for this sum already in the hands of the former; and this attempt to force a second payment will be seen to be entirely absurd if we suppose that Eddy had been the survivor in the action instead of Noyes, while the same rule would of course prevail in either case.

The difficulty of maintaining a joint action upon the facts found below is so apparent that the plaintiffs' counsel are compelled to assert, and they do assert, that the payment of the $17,595.93, was not in fact a payment upon the partnership debt at all, but a transaction entirely foreign to that debt; as perhaps a loan to Eddy, or a delivery of so much money to him for some unknown purpose. Such a view of the transaction we can by no means concur in. It is a palpable denial of the finding of the Judge, which is that Eddy received the money to apply, and in fact did apply it, in payment and satisfaction of the debt. Not to insist, as perhaps might properly be done, that the entire debt of $18,808.38 was released by the compromise (for one partner could do this), we may at least say that the two partners can recover no more

than the difference between that sum and the sum paid, and for that it is agreed by the defendants that the verdict may stand if the rest is remitted on the record.

Now let us inquire on what ground it is that the plaintiffs claim that the money received by Eddy was not a payment and satisfaction of the partnership debt when it had been agreed that it should be. It is to be observed that the state of the company account between Noyes and Eddy nowhere appears upon the papers. That fact seems to have been thought quite immaterial upon the trial of the cause, as indeed it would be in a suit by partners against a third person to recover an unpaid partnership debt. Hence we have no means of knowing that Eddy, by receiving the money, whether to apply on his own debt against the company, or to pay other creditors of the company, or to reimburse himself for his capital advanced, has done his partner any injustice whatever. Whatever may have been threatened, we do not see that any injustice has actually been perpetrated on Noyes, nor can we know it, until the account is settled between them, or the state of the account agreed upon.

But the counsel of Mr. Noyes claim it to be an important fact that their client notified the president of the railroad company to make no settlement unless both partners were present, and that the president agreed to this. The counsel are not entirely agreed whether this notice meant that the defendants should not settle with certain factorizing creditors without the contractors were present, or that one partner should not be paid unless the other was present and agreed to it. Be this as it may, it is not found that Eddy assented to the arrangement or in fact had notice of it, and he certainly had power as partner to settle with their debtor and receive payment. He was not affected by what Noyes had done, for, if so, then he could have stopped payment to Noyes, and the defendants could not then have paid their debt, or made a legal tender of it to either. This would be absurd. The defendants had nothing to do with the plaintiffs' quarrels. A Court of equity could, if necessary, in a bill with proper averments, have interposed; but the request of Noyes had no legal effect. With-

out more than appears in this case the defendants could pay either of the partners, for they constituted but one person. The circumstance that the president promised not to pay Eddy separately, if that be the construction of the request, amounts to nothing against Eddy. If the president has broken a legal promise to the injury of Noyes, the remedy is against him, but it is not enough to defeat the payment made to the partner Eddy.

It is urged further, that Eddy's purpose in effecting a settlement was to get the money into his own hands and not account for it, and that the defendants were cognisant of this, and yet settled with him, partly because they could settle with him more favorably than with both, and partly to enable him to put the money into his own pocket. But Eddy is accountable for it at all events as a partner, and we do not know but that every dollar of it was justly due to him, or to the partnership creditors who perhaps are urging their claims against him or his estate. We cannot see that a fraud has been accomplished to the injury of the partnership, or even of Mr. Noyes, although there has been a breach of the confidence which belongs properly to the partnership relation, and in ordinary cases is inseparable from it; and even if a fraud has been committed by the company on Noyes, it would not be a fraud on Eddy, or on the partnership as such, and no action could be maintained in the name of the partnership for it.

We have not thought it important to discuss the law of the cases cited on the argument. It seems to us to agree with the views which we have expressed as the result of our own reflections. We consider the rule to be this—that wherever one partner settles with a debtor of the company and receives payment of the debt, he cannot retain the money and repudiate the settlement; nor can he, either alone or in union with his partner, recover the debt a second time.

It may be proper, in view of some of the cases cited, that we remark that there is a wide difference between joint plaintiffs and joint defendants in cases involving the acts of one partner, such as settlements, and payments by or to him in the partnership business. In the first each plaintiff must have a perfect cause of

action, as much so as if he had sued alone; in the latter each will stand on his own personal merits or individual defence.

Nor have we gone into the question whether the authority of a partner to bind his copartner within the scope of the partnership, may not be revoked or restricted as to *executory* contracts, with notice to the party dealing with him to that effect. We are inclined to think that it may, and that it was so held in the case of *Leavitt* vs. *Peck*, 3 Conn. 124. But the payment of an existing debt to one of the partners, notwithstanding the request of the other that it should not be so paid, is a very different matter. Debtors have rights of their own, and they are not dependent upon the continuance of partnership authority for the discharge of their duties. Unless there has been an assignment with notice, or an injunction from Chancery, they may treat each partner of the firm to which they are indebted as representing the whole company, however numerous.

We advise a new trial, unless the amount of the payment in question shall be remitted on the record.

In this opinion the other judges concurred.

RECENT ENGLISH DECISIONS.

Court of Common Bench.

KENNEDY *vs.* BROUN AND WIFE.[1]

A promise by a client to pay money to a counsel for his advocacy, whether made before, or during, or after the litigation, has no binding effect.

The relation of counsel and client renders the parties mutually incapable of making any legal contract of hiring and service concerning advocacy in litigation.

A barrister became the advocate of the female defendant, and during the continuation of the litigation she made repeated requests to him for exertions as such, and repeatedly promised to remunerate him for the same; and after the end of the litigation she spoke of the amount of this remuneration, and admitted the amount of debt due for such remuneration to be a certain sum, and promised to pay it: *Held*, that these facts did not constitute any obligation on the part of the defendant to pay.

[1] 7 L. T. Rep., N. S. 626. 9 Jurist Rep., N. S. 119.